GOVERNMENT'S TRIAL BRIEF

Nov. 12, 1997

V.DEFENSE CASE

A. Mental Defense

On June 24, 1997, Kaczynski served notice of his intent to introduce expert psychiatric testimony pursuant to Rule 12.2 (b) Pursuant to this Court's order requiring further clarification of the notice, on October 9, 1997, Kaczynski informed the government that the previously noticed expert testimony will relate to schizophrenia, paranoid type. The notice does not state how this testimony will bear upon the issue of guilt. The government submits that unless the defendant makes a preliminary showing that the alleged condition would negate an element of the offense such testimony is inadmissible.

1. The Insanity Defense Reform Act Prohibits The Use of Psychiatric Evidence Short of Insanity to Excuse or Mitigate the Offense

The Insanity Defense Reform Act of 1984, 18 U.S.C.A. § 17 ("IDRA") , redefined the insanity defense under federal law, and placed significant restrictions on the use of mental defect evidence. Section 17 provides:

> (a) It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease does not otherwise constitute a defense.
>
> (b) The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

The IDRA effected existing insanity law in at least three ways. First, it

deleted the "volitional prong of the commonly accepted Model Penal Code approach which permitted acquittal if the defendant "as a result of mental disease or defect . . . lacks substantial capacity . . . to conform his conduct to the requirements of law." United States v. Pohlot, 827 F.2d 889, 896 (3d Cir. 1987) (quoting Model Penal Code § 4.01 (1962). This change had the effect of returning insanity law to the familiar McNaghten rule. United States v. Twine, 853 F.2d 676, 678 (9th Cir. 1988). Second, insanity became an affirmative defense, shifting the burden of proof to the defendant by clear and convincing evidence. Pohlot, 827 F.2d at 896. Third, § 17 provides that, beyond insanity, "[m]ental disease or defect does not otherwise constitute a defense." Twine, 853 F.2d at 679. See also United States v. Cameron, 907 F.2d 1051, 1061 (11th Cir. 1990) (Listing these three changes as well as two others).

Therefore, with the IDRA, "Congress intended to restrict a defendant's ability to excuse guilt with mental defect evidence, curtailing the insanity defense." United States v. Twine, 853 F.2d 676, 679 (9th Cir. 1988) (emphasis added) . The Report of the Senate Judiciary Committee explained that the language stating that "mental disease or defect does not otherwise constitute a defense" was "intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a 'diminished responsibility" (*14. "Diminished responsibility" raises a claim of justification or excuse to mitigate crimes based on a mental abnormality of the accused that substantially impaired his mental responsibility. Frisbee, 623 F.Supp. at 1221 n.2. It is a "pure defense" that allows a sane, but mentally disabled, defendant to be held "less culpable than his normal counterpart who commits the same criminal act." Peter Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Children of a Doomed Marriage, 77 COLUM. L. REV. 827, 829 (1977).*) or some similarly asserted state of mind which would serve to excuse the offense and open the door . . . to needlessly confusing psychiatric testimony." Frisbee, 623 F.Supp. at 1220, quoting S REP. No. 225, 98th Cong., 2nd Sess. 229, reprinted in 1984 U.S.C.C.A.N. 3182, 3411; see United States v. Cameron, 907 F.2d 1051, 1066 (11th Cir. 1990) ("Congress meant to preclude the use of 'non-insanity' psychiatric evidence that points toward 'exoneration or mitigation of an offense...'"), quoting United States v. Pohlot, 827 F.2d 889, 890 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988). The Act and its legislative history thus explicitly prohibit psychiatric evidence that amounts to an affirmative defense other than insanity. 18 U.S.C.A. § 17(a); 5. REP. No. 225; H.R. REP. No. 98-177, 98th Cong. 1st Sess. 14 (1983) ("Since ... the Committee is concerned that additional defenses based on mental disorders could be developed by the courts in order to circumvent the tighter requirements developed by Congress ... the bill provides that the Committee's test constitutes the only affirmative defense that will be applicable in Federal courts"); see United States v. Westcott, 83 F.3d 1354, 1358 (11th Cir. 1996) , cert. denied, 117 S.Ct. 269, ("Through the Act, Congress intended to prohibit the presentation of mental disease, short of insanity, to excuse conduct").

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2. Psychiatric Evidence Short of Insanity Is Inadmissible Unless It

Supports A Legally Acceptable Theory Negating Mens Rea

Despite its stated purpose to restrict the insanity defense the IDRA does not bar psychiatric evidence to negate an element of the offense. As the Court observed in Pohlot: "Both the wording of the statute and the legislative history leave no doubt that Congress intended, as the Senate Report stated, to bar only alternative 'affirmative defenses' that 'excuse' misconduct not evidence that disproves an element of the crime itself." 827 F.2d at 897, citing United States v. Gold, 661 F.Supp. 1127, 1130-31 (D.C. Cir. 1987) and United States v. Frisbee, 623 F.Supp. 1217 (N.D.Cal.1985) . The Ninth Circuit has adopted Pohlot's reasoning. United States v. Twine, 853 F.2d 676, 679 (9th Cir. 1988) citing Pohlot, Gold and Frisbee. In Twine, the Court explained:

> Unlike insanity, [the diminished capacity] defense is not an excuse. Diminished capacity is directly concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime. Successful defendants simply are not guilty of the offense charged, although they are usually guilty of a lesser included offense.

853 F.2d at 678. See also United States v. Fazzini, 871 F.2d .635, 641 (7th Cir. 1989) (distinguishing "diminished responsibility" from "diminished capacity") (*15. In Pohlot, the Court identified three variants of the "diminished capacity" defense. First, admission of evidence of mental abnormality to negate mens rea. Second, admission of evidence that the defendant not only lacked mens rea in the particular case but also that he lacked the capacity to form the mens rea. Third, "partially diminished capacity . . . which permits the jury to mitigate punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act." 827 F.2d at 903-04. Only the first of these variants survives the IDRA. Id. at 905.*)

Nevertheless, courts have cautioned that the prohibition of diminished responsibility defenses requires courts to carefully scrutinize psychiatric defense theories based on mens rea. In Pohlot, the court observed:

> Psychiatrists are capable of applying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of mens rea. Presenting defense theories or psychiatric testimony to juries that do not truly negate mens rea may cause confusion about what the law requires.

827 F.2d at 890. The Court made a similar observation in Cameron:

> Because psychiatric testimony (1) will rarely negate specific intent, (2) presents an inherent danger that it will distract the jury[] from focusing on the actual presence or absence of mens rea, and 'may easily slide into wider usage that opens up the jury to theories of defense more akin to justification,' . . . district courts must examine such psychiatric evidence carefully to ascertain whether it would, if believed, "support a legally defensible theory of lack of mens rea.

907 F.2d at 1067; United States v. Westcott, 83 F.3d 1354, 1358 (11th Cir. 1996) (only psychiatric evidence which supports a legally acceptable theory of lack of mens rea should be admitted); United States v. Fishman, 743 F.Supp. 713, 721 (N.D. Cal. 1990) (because "psychiatric testimony raises a strong danger of misuse, courts must carefully weigh whether the proof offered ... would aid the jury in deciding the ultimate issues.") (*16. In making this determination, the court should focus on "the proffered link or relationship between the psychiatric evidence offered and the mens rea issue in the case." Cameron, 907 F.2d at 1067 n.31.*) Accordingly, as the Court pointed out in Frisbee, "while the Ninth Circuit allows the admission of expert testimony on the issue of specific intent, the admission of such testimony is not automatic." 623 F.Supp. at 1224, citing United States v. Byers, 730 F.2d 568, 570 (9th Cir. 1984) ("Even assuming specific intent is required and . . . the psychiatric testimony could in the court's discretion have been admitted to negate specific intent, [the defendant] was not automatically entitled to present that testimony").

In this case, there is a great danger of jury confusion. The evidence will show that the defendant is responsible for 16 bombings committed over an 18 year period. For each of these bombs there is a wealth of evidence showing the defendant's planning and premeditation as well as written admissions of his desire to kill, his frustration at not being able to kill with consistency and his feelings of success when he does kill. Against this evidence the defendant seeks to put on psychiatric testimony, the details of which are not currently known, which relates to paranoid schizophrenia. However, expert witness summaries which the defendant provided to the government on October 20, 1997, do not even address whether the defendant's alleged mental defect could have prevented him from forming the requisite mens rea for the charged crimes. (*17. Fed.R.Evid. 16(b) (1) (C) requires the defendant to inform the government of all conclusions reached by their experts. The absence from the expert witness summaries of any conclusion relating to negation of mens rea suggests that none of the defendant's experts reach such an conclusion.*) As previously noted, to be relevant this evidence must somehow negate specific intent for each of the four charged bombs. Otherwise, the defendant's proffered testimony is merely a back door attempt to resurrect the "diminished responsibility" defense which Congress has prohibited.

Many courts and commentators have noted that psychiatric evidence will only rarely negate specific intent. Cameron, 907 F.2d at 1067; See H.R. REP. No. 98-177 at 15 n.23 ("Mental illness rarely, if ever, renders a person incapable of understanding what he or she is doing"); Pohlot, 827 F.2d at 900 ("Only in the rare case, however, will even a legally insane defendant actually lack the requisite mens rea purely because of a mental defect").

Generally, psychiatric evidence attempting to show that the defendant lacked the capacity to form the requisite mens rea is not admissible to show that he lacked the mens rea in a particular case. As the Court in Pohlot explained:

> Whether a defendant had the capacity to form mens rea is, of course, logically connected to whether the defendant possessed the requisite mens rea. Commentators have agreed,

> however, that only in the most extraordinary circumstances could a defendant actually lack the capacity to form mens rea as it is normally understood in American law. [citation omitted] Even the most psychiatrically ill have the capacity to form intentions, and the existence of intent usually satisfies any mens rea requirement. Commentators have therefore argued that permitting evidence and arguments about a defendant's capacity to form mens rea distracts and confuses the jury from focusing on the actual presence or absence of mens rea.

827 F.2d at 903-04. In Pohlot, the defendant proffered evidence that he suffered from compulsive personality disorder, passive dependent personality disorder and passive aggressive personality disorder, and as a consequence, did not have the capacity to form the requisite mens rea for the crime of attempting to hire a professional killer to murder his wife. In finding that such evidence did not support a legally acceptable theory to negate mens rea the Court observed:

> [P] sychiatric testimony suggesting that a defendant lacks mens rea may often focus not on the defendant's intent but on the defendant's awareness of intent . . . [but] a lack of self reflection does not mean a lack of intent and does not negate mens rea. . . Criminal responsibility must be judged at the level of the conscious. If a person thinks, plans and executes that plan at [a conscious] level, the criminality of his act cannot be denied, wholly or partially, because, although he did not realize it, his conscious was influenced to think, to plan and to execute the plan by unconscious influences which were the product of his genes and his lifelong environment.

827 F.2d at 906. The Court concluded:

> We often act intending to accomplish the immediate goal of our activity, while not fully appreciating the consequences of our acts. But purposeful activity is all the law requires. When one spouse intentionally kills the other in the heat of a dispute, he or she will rarely at that moment fully appreciate the consequences of the murder. The spouse is guilty of homicide nonetheless. . . Pohlot therefore offered his evidence of mental abnormality in support of a legally unacceptable theory of lack of mens rea that amounts covertly to a variation of the partially diminished capacity defense precluded by § 17(a).

827 F.2d at 907. See Cameron, 907 F.2d at 1061 ("Psychiatric evidence of ... inability to reflect on the ultimate consequences of one's conduct is inadmissible whether offered to support an insanity defense or for any other purpose"); Westcott, 83 F.3d at 1358 (holding evidence showing defendant lacked capacity to form mens rea, as opposed to evidence showing defendant actually lacked mens rea, is inadmissible)

Psychiatric evidence indicating an inability to control the behavior that produced the criminal conduct is also not sufficient to negate specific

intent and should not be admitted. As the Court explained in Cameron:

> [I]t is clear that [by passage of the IDRA] Congress meant to eliminate any form of legal excuse based upon one's lack of volitional control. This includes a diminished ability or failure to reflect adequately on the consequences or nature of one's actions. While scholars might debate the subtle distinctions in moral culpability occasioned by a person's relative capacity to consider her actions or resist unconscious motivation, Congress chose to eliminate any form of legal excuse based on psychological impairment that does not come within the carefully tailored definition of insanity in section 17 (a) Psychiatric evidence of impaired volitional control or inability to reflect on the ultimate consequences of one's conduct is inadmissible whether offered in support of an insanity defense or for any other purpose.

907 F.2d at 1066 (barring evidence that defendant suffered from schizophrenia where she failed to show how it negated specific intent to distribute drugs) ; see United States v. Peralta, 930 F.Supp. 1523, 1531 (S.D. Fla. 1996) (barring evidence that defendant suffered from persecution mania and was given to violent outbursts as not supporting a legally acceptable theory of lack of mens rea).

In United States v. Robinson, 804 F.Supp. 830, 833 (W.D. Va. 1992) , the defendant sought to introduce expert testimony that he suffered from paranoid schizophrenia, the symptoms of which can include a tendency toward compulsive behavior. Defendant argued that this testimony negated the premeditation element for first degree murder. Id. The district court found, first, that testimony regarding defendant's schizophrenia, by itself, stated nothing relevant to his ability to premeditate. Id. Second, the court found that although the defendant was not legally insane, he was attempting to introduce, "by a sort of back door route, " evidence that his mental disease caused him to act in a compulsive manner that the law must excuse. Id. The court held that the proffered testimony went inevitably toward an affirmative defense that the defendant was not "fully responsible" for his actions, and was thus precluded under the Act. Id.

Even where psychiatric evidence is potentially probative of the defendant's mental state, the court may still bar such evidence if its probative value is substantially outweighed by its capacity to confuse or mislead the jury. Fed. R. Evid. 403, 702. That was the case in United States v. Schneider, 111 F.3d 197 (1st Cir. 1997). Schneider was charged with mail and wire fraud and did not dispute the core events supporting the charges. However, Schneider proffered evidence that at the time of the crime his capacity and judgment were significantly impaired by "chemical dependency and major depression with probable mania" and that, as a consequence, he did not have the requisite intent to deceive. Id.at 199. The Court responded as follows:

> This might not appear at first to go very far in negating his capacity to deceive, especially as Schneider's scheme continued over several months...Still, evidence may be "relevant under Rule 401's definition, even if it fails to prove

> or disprove the fact at issue -- whether taken alone or in combination with all other helpful evidence on that issue . . . Schneider's best argument is, therefore, that his medical evidence did go some distance to negate intent to deceive and so was relevant. Where evidence goes "some distance" it may be tempting to say that it is not relevant. But we have some doubt that this usage comports with Rule 401's definition quoted above. . . Yet the evidence offered, both here and in Pohlot, suggests that the defendant was temporarily out of his mind (even though not insane under section 17(a)) and that his crime was mitigated by his psychological condition. Such evidence tends to reintroduce the very concepts Congress wanted to exclude and thereby to mislead the jury.

Id. at 202-03. See also Twine, 853 F.2d at 679 n.l (court has "wide latitude" to admit or exclude psychiatric testimony on the question of defendant's specific intent); Frisbee, 623 F.Supp. at 1224 (court may exclude expert psychiatric testimony that is unduly confusing, misleading or will not be of assistance to the jury in determining the issue of specific intent); United States v. Sewards, 879 F.Supp. 502, 514 (E.D. Pa. 1995) citing United States v. Moran, 937 F.2d 604 (4th Cir. 1991) (unpublished) (excluding expert testimony that defendant's cocaine addiction caused mental condition which negated specific intent because of "great danger" that evidence would distract jury from focusing on actual presence or absence of mens rea).

Finally, to be admissible, psychiatric evidence offered to negate mens rea must meet the further requisites of scientific reliability. Fed. R. Evid. 702; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-91 (1993). See Fishman, 743 F.Supp. at 721 (holding defendant's psychiatric evidence inadmissible under Rule 702).

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3. The Government Is Entitled to a Hearing To Determine the Admissibility of the Defendant's Psychiatric Evidence

For the above reasons, psychiatric evidence should be evaluated outside the presence of the jury to determine if it supports a legally acceptable theory. United States v. Cameron, 907 F.2d 1951, 1067 (11th Cir. 1990); United States v. Pohlot, 827 F.2d 889, 906 (3d Cir. 1987); United States v. Brawner, 471 F.2d 969, 1002 (D.C. Cir. 1972); See also United States v. Schneider, 111 F.3d 197, 201-02 (1st Cir. 1997). As the Court said in Pohlot:

> Notions of intent, purpose and premeditation are malleable and at their margins imprecise. But the limits of these concepts are questions of law. District courts should admit evidence of mental abnormality on the issue of mens rea only when, if believed, it would support a legally acceptable theory of lack of mens rea. In deciding such a question, courts should evaluate the testimony outside the presence of the jury.

827 F.2d at 905-06.

4. Defendant's Expert's May Not State an Opinion On Whether the Defendant Did or Did Not Form An Intent to Kill at the Time of the Offense

One of the changes brought about by the IDRA was to limit the use of expert psychological testimony on ultimate legal issue. Thus, Federal Rule of Evidence 704(b) now provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are for the trier of fact alone.

The legislative history of Rule 704(b) states that the rule is intended to limit experts to "presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect, and what the characteristics of such a disease or defect, if any, may have been." See United States v. Frisbee, 623 F.Supp. 1217, 1223-24 (N.D.Cal. 1985) (quoting legislative history and limiting expert's testimony accordingly).

5. Psychiatric Evidence Is Not Admissible on The § 924 (c) (1) Offenses

Because psychiatric evidence is only admissible to negate the specific mental element required for the offense, it has no application to general intent crimes. United States v. Twine, 353 F.2d 676, 679 (9th Cir. 1988); United States v. Cameron, 907 F.2d 1051, 1063 n.20 (11th Cir. 1990); United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1989).

The crime described in 18 U.S.C. § 924(c) (1) is a general intent crime. United States v. Brown, 915 F.2d 219, 224-26 (6th Cir. 1990); United States v. Peralta, 930 F.Supp. 1523, 1529 (S.D. Fla. 1996); United States v. Meader, 914 F.Supp. 656, 660 (D.Me. 1996). Accordingly, if evidence to negate mens rea is admitted at trial, the jury should be instructed that such evidence is not a defense to the § 924(c) charges.

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